No. 91-1208

Supreme Court, U.S.
FILED
JAN 24 1992
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1991

DRILAKE FARMS, INC., et al.,

Petitioners,

v.

JULIO SURRILLO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a grower-employer's compliance with rules and regulations of the Government of the United States, standing alone, constitutes "minimum contact" with any other state, conferring on that state *in personam* jurisdiction over the grower-employer.

2. Whether the decision by the United States Department of Labor to send a grower-employer's job clearance order to a particular state through the national job clearance system created by the Wagner-Peyser Act, without more, confers upon that state *in personam* jurisdiction over the grower-employer whose job clearance order is thus circulated.

3. Whether conferring in personam jurisdiction upon the courts of states designated each year by the United States Department of Labor to receive job clearance orders over the employers who submitted those job clearance orders only to employment service offices in their home states is contrary to the congressional employment development policies mandated by the Wagner-Peyser Act.

PARTIES TO THE PROCEEDING BELOW

The Respondents before this Court, who were Plaintiffs before the Circuit Court of Jefferson County and Appellants before the West Virginia Supreme Court of Appeals, are the following individuals:

Miguel A. Ramos

Jose M. Moreno

Benjamin Lopez

Marcial Gonzalez

Julio Aponte

William Ocasio

Jose L. Zayas

Ramon Vazquez

Victor Vazquez

Reinaldo Morales

Juan Rodriguez

Pedro Vazquez

Santos Rodriguez

Julio Surrillo (for his minor son, Julio Surrillo Gonzalez)

Ramon Solivan (for his minor son, Julio Solivan)

Carmelo Rosario Vazquez

The Petitioners before this Court, who were Defendants before the Circuit Court of Jefferson County and Appellees before the West Virginia Supreme Court of Appeals, are the following apple growers located in Jefferson County, West Virginia:

Irvin King

Drilake Farms, Inc.

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DECISIONS BELOW

On September 17, 1990, the Circuit Court of Jefferson County, West Virginia, held for the grower-Petitioners, denying full faith and credit to the decisions of Puerto

Rican Courts granting judgments to the worker-Respondents. That ruling was amended but sustained by subsequent Order of December 20, 1990. The Opinions, both not reported, appear at Appendix A hereof. The workers appealed.

On November 1, 1991, the Supreme Court of Appeals of West Virginia reversed and remanded with instructions to enter summary judgments in favor of the worker-Respondents. The Opinion of the Supreme Court of Appeals of West Virginia (and Dissent) appears at Appendix B hereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, § 1257(a). The decision sought to be reviewed was

entered by the Supreme Court of Appeals of West Virginia November 1, 1991.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are (i) Rule 4.7 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, 32 L.P.R.A. App. II, Rule 4.7(a); (ii) the Immigration and Nationality Act, 8 U.S.C. §§ 1101, et seq.; and (iii) the Wagner-Peyser Act, 29 U.S.C. §§ 49-49K. The administrative regulations involved are (i) the Immigration and Naturalization Service Regulation, 8 C.F.R. § 214.2 (1978); (ii) the Temporary Foreign Labor Certification Process Regulations, 20 C.F.R. §§ 655.200, et seq. (1978); and (iii) the Wagner-Peyser Act Employment

Service Regulations, 20 C.F.R. §§ 653.500, et seq. (1978). The pertinent provisions of these statutes and regulations appear at Appendix D hereof.

The Constitutional provisions involved are: (i) U.S. Const. amend. V; and (ii) U.S. Const. amend XIV, § 1. Those provisions appear at Appendix D hereof.

STATEMENT OF THE CASE

The grower-Petitioners (hereafter "Drilake) operate a family owned orchard in Jefferson County, West Virginia. Worker-Respondents are Puerto Rican citizens who obtained default judgments against Drilake in the Superior Courts of the Commonwealth of Puerto Rico. In this action, the Puerto Ricans seek to

enforce these default judgments against Drilake. The only issue is whether the Courts of Puerto Rico had personal jurisdiction over Drilake pursuant to Puerto Rico's long-arm statute so that the default judgments are entitled to full faith and credit by the West Virginia Courts.

Apples are an extremely perishable fruit. They must be harvested within only a few days of becoming ripe or they lose most of their economic value. Apples are also harvested only once a year, generally in the fall. If, for any reason, an apple grower fails to harvest his crop when it is ready, he faces financial ruin. For many years, there has existed an inadequate supply of domestic farm labor to harvest

apples. 1/ As a consequence, in order to assure the timely harvesting of their crops, apple growers have had to import labor from abroad to supplement the domestic labor supply.

The Immigration and Nationality Act ("INA") and its implementing regulations authorize agricultural employers to apply to the Immigration and Naturalization Service ("INS") for certification to admit into this country and to employ temporary foreign workers when the domestic labor supply is inadequate. 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c); 8

1/ The dearth of domestic harvest labor is not limited to apple farming, but affects agriculture generally. Agricultural Labor Certification Programs and Small Business: Hearings Before the Select Committee on Small Business, U.S. Senate, 95th Cong., 1st Sess. (1977) (Statement of Sen. Robert Packwood); see also S. Rep. No. 1515, 81st Cong., 2d Sess. 578 (1950).

C.F.R. § 214.2(h)(3) (1984). This program is known as the "H-2 program." The temporary workers brought in under it are called "H-2 workers."

Employer applications to INS for H-2 workers must be accompanied by a certificate from the U.S. Department of Labor ("DOL") that qualified U.S. workers are not available and that the employment of temporary foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(3) (1984). In order to determine the availability of U.S. workers prior to making any certification to INS, DOL first requires employers to attempt to recruit U.S. workers by using the employment service system created by the Wagner-Peyser Act. 29 U.S.C. §§ 49-49K.

The Wagner-Peyser Act was enacted in 1933. It established a national system of public employment offices designed to provide a no-fee labor exchange for both employers and job seekers. See 20 C.F.R. § 653.501(a) (1984). The national employment service system coordinates the activities of the state and Federal public employment service offices in aid of the policy objectives of reducing unemployment throughout the nation and stabilizing labor conditions among the states, Puerto Rico, Guam and the U.S. Virgin Islands. H. Rep. No. 158, 73d Cong., 1st Sess. 2 (1933).

The overwhelming majority of employers who utilize the employment service system as a means of finding workers to fill their jobs have no need

ultimately to import temporary workers from abroad. The process leading to the recruitment of domestic workers for employers who have no anticipation of needing temporary foreign workers and for employers who do anticipate such a need is identical. See 20 C.F.R. § 653.500 et seq. (1984) (domestic workers recruitment only); 20 C.F.R. § 655.200 et seq. (1984) (domestic and temporary foreign workers).

An employer seeking to recruit domestic workers through the employment service system submits to its local employment office a job clearance order. An employer ultimately seeking temporary foreign workers submits to its local employment office the very same job clearance order. In addition, the prospective H-2 employer files with the

employment office an application for DOL certification to admit and employ temporary foreign workers. As a consequence, the issues involved in this litigation are not confined to employers of H-2 workers. They affect the employment service system generally and all employers who seek to use that system as a means of recruiting domestic labor.

Employer job clearance orders set out in detail the terms and conditions of the jobs being offered. 20 C.F.R. § 655.201(b)(1). The job clearance order is a formal government document, which gives notice of the job opportunity which it describes. The clearance orders in these cases detailed the procedures which workers were to follow in order to present themselves to

the orchards for interview, either in person or by telephone. Under the explicit terms of the job orders, the employer first needed to accept the worker's offer to work before the worker could be hired.

Upon receipt of an employer's job clearance order, the local employment service office attempts first to recruit workers for the job described in the clearance order in the local job market. 20 C.F.R. § 653.501(d)(7). If sufficient workers are not available locally, the job clearance order is placed in the intrastate clearance system for circulation to employment service offices statewide. Id. at § 653.501(d)(3). Should state-wide recruitment prove unsuccessful, the state agency then sends the job

clearance order to DOL for placement into the interstate clearance system. Id. at § 653.501(e)(2).

DOL's Regional Administrator for an employer's area has the exclusive responsibility of determining the states which are to receive job clearance orders for particular jobs. 20 C.F.R. §§ 653.501(e)(3) and 655.205(a). Such decision is made anew each year and is dependent upon the circumstances present in the labor marketplace. In one year a job clearance order might be circulated from Maine to Hawaii, Colorado and Texas. In another year, that same job clearance order might go to California, Texas and Florida. Central to understanding the importance of this case is this: In a given year, when an employer, say, in Kennebunkport,

Maine, files his job clearance order with his local state employment office, he has no way of knowing to which states that order might ultimately be transmitted. The employer cannot designate to which states the order is to be sent; neither may he interfere with the decisions of DOL's Regional Administrator to circulate the order to particular areas.

If at any time in the recruitment process, local, intrastate, or interstate recruitment produces workers sufficient in number to meet an employer's labor needs, the recruitment process stops. Should local or state-wide recruitment produce an adequate labor force, the employer's job clearance order will not be circulated to DOL for nationwide recruitment.

In the present case, on April 28, 1978, Drilake submitted its job clearance order for 27 workers to their local employment service office in Winchester, Virginia. When local and state-wide recruitment failed to produce a single U.S. worker, the Virginia Employment Service, following the Wagner-Peyser scheme, sent to DOL Drilake's clearance order for circulation to labor surplus states to be selected by DOL. Late in the process, DOL sent Drilake's clearance order to Puerto Rico.

Although Puerto Rico is included in the Wagner-Peyser system the same as a state, in 1977 Puerto Rico was held ineligible to participate in the Wagner-Peyser process because of the existence of a law in Puerto Rico known

as Public Law 87, 29 L.P.R.A. §§ 526 et seq.2/ Public Law 87 was held to impose on mainland employers terms and conditions of employment more burdensome than those imposed by INA and the Wagner-Peyser Act and, therefore, Puerto Rican workers were considered not "available". Clearance orders would not be circulated to Puerto Rico because of Public Law 87. This was the status when Drilake filed its job clearance order on April 28, 1978.

On July 13, 1978, the Puerto Rican Legislature amended Public Law 87 to authorize the Puerto Rican Secretary of Labor and Human Resources to exempt mainland employers under certain

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2/ See Flecha v. Quiros, 567 F.2d 1154 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978).

circumstances. The amendment was intended to free the Puerto Rican labor force for inclusion in the interstate clearance system. Claiming to have exempted Drilake, the Puerto Rican Secretary requested DOL to forward Drilake's job clearance order to Puerto Rico on August 2, 1978, and thereafter proceeded to recruit Puerto Rican workers without contacting Drilake even though Drilake's job clearance order specifically required that acceptance of the employment offered must be through contacting the Winchester, Virginia, office of the Virginia Employment Service in order "...to ascertain current employment, crop, and housing information and to enable proper arrangements to be made."

On August 16, 1978, Drilake was

advised that 19 U.S. (Puerto Rican) workers had been identified who were available to fill the job opportunity. Drilake was denied certification as to 19 of the requested employees and approved for the remaining 8.

Drilake had no contact with Puerto Rico. Drilake had no offices in Puerto Rico, hired no agents in Puerto Rico 3/, sent no money or telegrams to Puerto Rico, received no telegrams, telephone

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3/ To the contrary, the regulations specifically provide that an agricultural employer may designate either the U.S. Department of Labor or, in this case, the Puerto Rico Department of Labor and Human Resources to act as agent for the purposes of hiring but, in such cases, a special form titled "Delegation of Hiring Agent (Form ES 569)" must be signed by the agricultural employer and attached to the clearance order. This was not done in this case as has been stipulated between the parties.

calls or other contact from Puerto Rico, did not travel to Puerto Rico, received no communications from the Puerto Rican Secretary of Labor and had no control over any of the actions of the Puerto Rican Secretary of Labor or any other official or instrumentality of the Puerto Rican government.

Drilake filed its job clearance order in Winchester, Virginia. Its routing outside Virginia was directed by DOL acting without any input from Drilake.

Most of the Respondents are Puerto Rican workers who claimed to have been hired by Drilake as a result of the Puerto Rican Secretary of Labor having acted as hiring agent for Drilake. Two of the Plaintiffs were parents of workers who claimed to suffer mental

anguish as a result of their sons' experiences in 1978. The claims of the workers in the Puerto Rican lawsuits and the findings of the Puerto Rican Superior Courts on the question of agency ignored the now admitted absence of the signing of a Delegation of Hiring Agent (Form ES 569) by Drilake.

Drilake did not appear in the Puerto Rican Courts and default judgments were entered. The worker-Respondents now seek to enforce those Puerto Rican judgments in West Virginia. Drilake asserts that the Puerto Rican judgments are not entitled to full faith and credit because of lack of personal jurisdiction over Drilake. The only contact between Drilake and Puerto Rico was the fortuitous forwarding under the Wagner-Peyser Act

of its job clearance order to Puerto Rico which the DOL determined, in its sole discretion under that Act, to be a labor supply state.

The question presented the Court below was whether the submission by a grower of a job clearance order to its local employment service office in Winchester, Virginia, created a sufficient nexus between the grower and all states to which that clearance order ultimately might have been sent by DOL so that that act, without more, conferred upon the Courts of those states long-arm jurisdiction over the grower-employer.

At the trial, the case was submitted on agreed facts and cross-motions for summary judgment. The Circuit Court of Jefferson County, West

Virginia, decided in favor of Drilake, holding that the exercise of in personam jurisdiction over Drilake based on the facts presented violated the due process requirements of the U.S. Constitution. The worker-Respondents appealed and on November 1, 1991, the West Virginia Supreme Court of Appeals reversed and remanded the case for entry of summary judgments in favor of the worker-Respondents against Drilake.

In reversing the Trial Court, the West Virginia Supreme Court of Appeals essentially followed the reasoning of the New York decision in Rios v. Altamont Farms, Inc., 64 N.Y.2d 792, 476 N.E.2d 312, 486 N.Y.S.2d 913 (1985), cert. den. 105 S. Ct. 3529 (1985) (reversing and adopting the dissent in Rios v. Altamont Farms, Inc., 475

N.Y.S.2d 520 (N.Y. App. 1984).

Justice Neely vigorously from the West Virginia decision sought to be reviewed dissented, "...on the grounds that the undisputed facts demonstrate conclusively that there were no contacts with Puerto Rico sufficient to justify jurisdiction under International Shoe Co. v. Washington, 326 U.S. 310 (1945). Complying with appropriate rules and regulations of the government of the United States does not constitute a 'contact' with any other state or territory, and being 'apparently aware' does not constitute a jurisdiction-giving voluntary act". See App. B.

REASONS FOR GRANTING THE WRIT

A. The West Virginia Supreme Court of Appeals Has Seriously Misapplied This Court's Decisions Concerning the Minimum Due Process Requirements For the Assertion of In Personam Jurisdiction.

The Opinion sought to be reviewed specifically finds that Drilake initiated no direct contact with Puerto Rico, the Court shifting instead to focus on activities of others (i.e., the Puerto Rican employment office) to establish the nexus between Drilake and the forum state of Puerto Rico. That holding assaults the decisions of this Court which defined the standards for the assertion of in personam jurisdiction consistent with the due process requirements of the United States Constitution.

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), established the standard for the exercise of in personam jurisdiction by state courts over defendants who are not resident in those states: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." The minimum contacts analysis focuses on the conduct of the defendant, not the plaintiff. Any attempt to "shift the focus" of the presence of minimum contacts from the defendant to the plaintiff is tantamount to allowing

"plaintiff's contacts with the forum [to be] decisive in determining whether the defendant's due process rights are violated...[,] an approach...forbidden by International Shoe and its progeny." Rush v. Savchuk, 444 U.S. 320, 322 (1980). In the instant case, that is precisely what the West Virginia Supreme Court of Appeals did; it "shifted the focus" of the jurisdictional inquiry from the grower-petitioner to the worker-respondents, thereby infringing upon the growers' Constitutional guarantees.

The level of contact had by Drilake with Puerto Rico is uncontroverted. So far as Drilake's own actions are involved, it begins and ends with the filing of Drilake's job clearance order in the Winchester office of the Virginia

Employment Service on April 28, 1978, a time when Puerto Rico was ineligible to participate in the Wagner-Peyser system. Flecha v. Quiros, supra. The Puerto Rican contact was eventually consummated solely by the act of DOL in transmitting Drilake's job clearance order to Puerto Rico after the Puerto Rican Legislature intervened to amend Public Law 87 in a way which placed Puerto Rico back on the eligibility list. Drilake did absolutely nothing to "purposefully avail" itself of the "benefits and protections" of Puerto Rico. Kulko v. Superior Court, 436 U.S. 84, 97-98 (1978), reh'g. denied, 438 U.S. 908 (1979). In fact, Drilake was ignorant of DOL's recruitment efforts in Puerto Rico until after the recruitment process had begun.

After first conceding and finding that Drilake initiated no direct contact with Puerto Rico, the West Virginia Supreme Court of Appeals then placed heavy reliance on the foreseeability that the job clearance order would be forwarded elsewhere if insufficient workers were found in Virginia. But the foreseeability that is critical to due process analysis is not the mere possibility, or even likelihood, that a clearance order will find its way into the forum state but, rather, that the defendant's conduct and connection with the forum state are such that he should reasonably be expected to be hailed into court there. See Kulko v. Superior Court, supra, 436 U.S., at 97-98; Shaffer v. Heitner, 433 U.S.186, at 216 (1978).

The West Virginia decision sought to be reviewed wreaks havoc with the predictability requirement enunciated by this Court so clearly in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980):

> "...International Shoe Co. v. Washington, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' Hanson v. Denckla, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. ...", id. at 297.

Even if Drilake's job clearance order legally constitutes an offer of employment, the finding of the Puerto Rican Courts that it ripened into an employment contract with the aid and assistance of the Puerto Rican employment service simply ignores the fact that the job clearance order specified the exclusive method of acceptance which was to contact the Winchester office of the Virginia Employment Service. Western Colorado Fruit Growers Ass'n. v. Marshall, 473 F.Supp. 693, 696 (D. Colo. 1979). The stipulated facts in this case establish that the efforts of the Puerto Rico Department of Labor which ignored the clearance order directive that prospective employees be cleared through the Winchester, Virginia,

employment office produced not less than 41 Puerto Ricans to fill the 27 jobs available.

The West Virginia Supreme Court of Appeals attached significance to the fact that, in the present case, Drilake actually gave employment to those employee-respondents who showed up at its orchards. That finding ignores the Stipulation of the parties that a grower must provide employment to any qualified U.S. worker who applies for work until 50% of the contract period stated in the job clearance order has elapsed. See 20 C.F.R. 655.203(e). Drilake's compliance with that government regulation is not to be confused with an act of ratification of a supposed contract made in Puerto Rico through the agency of the Puerto Rican Secretary of Labor.

The West Virginia Supreme Court of Appeals essentially decreed that the Secretary of Labor of Puerto Rico was acting as the agent of Drilake. Not so. Drilake was unaware of the recruitment efforts in Puerto Rico until after those efforts were well underway. Moreover, DOL has a procedure whereby a grower can designate DOL or state officials as hiring agents for recruitment. The Employment Security Manual of the U.S. Employment Service required attaching an executed Designation of Hiring Agent Form ES 569 to any clearance order of an employer wishing to delegate hiring authority to someone other than himself. It is stipulated that Drilake never executed that form. Absent some affirmative action by Drilake to alter the normal relationship, the Secretary

of Labor of Puerto Rico must be viewed as acting on behalf of Puerto Rican workers. Drilake made no attempt to contact the Puerto Rican Secretary of Labor, received no communication from that official or his department and had no control over any of the actions of the Puerto Rican Secretary of Labor or any other official or instrumentality of the Puerto Rican government. There exists no basis whatsoever for the proposition that Puerto Rican officials acted as agent for Drilake in the recruitment of Puerto Rican workers.

The decision of the West Virginia Supreme Court of Appeals destroys the Constitutionally protected due process rights of all employers who rely on the interstate clearance system as a means of recruiting workers. The Opinion is

fundamentally at odds with the decisions of this Court. There was no contact with Puerto Rico by Drilake. Drilake at all times did nothing more than comply with the rules and regulations of the United States Government in exercising its right of access to the U.S. labor market. The intervening acts of both the Puerto Rican Legislature in amending Public Law 87 and the Department of Labor in deciding to send Drilake's job clearance order were essential to getting Drilake's job clearance order to Puerto Rico. In spite of this obvious fact, the West Virginia Supreme Court of Appeals has found this to be "purposeful availment" by Drilake of the privilege of conducting activities within the forum state of Puerto Rico.

The decision of the West Virginia

Supreme Court of Appeals must be reversed if there is to be any predictability to the legal system that would allow Drilake to structure its primary conduct with some minimum assurance as to where the conduct will or will not render it liable to suit. World-Wide Volkswagen v. Woodson, supra, at 297.

B. Recognizing In Personam Jurisdiction In All States to Which DOL May Send An Employer Job Clearance Order Could Destroy the Wagner-Peyser Act's Interstate Clearance System.

The Wagner-Peyser Act established the federal employment service system. The purpose of that system is to provide a no-fee national clearing house for employers of workers in order to promote congressional policy objectives of

reducing unemployment while at the same time stabilizing labor conditions throughout the states. The viability of the employment service system should be protected and promoted. Far from doing that, the decision of the West Virginia Supreme Court of Appeals inflicts upon that system a crippling blow.

In order for the employment service system to operate properly, DOL must be able to transmit job clearance orders to any area in the country where the citizens are in need of employment. If by doing that, however, the employers whose job orders are circulated become automatically, and without more, subject to the in personam jurisdiction of the state courts of every state to which the job order is sent, a burden will be imposed upon the system which it cannot

reasonably be expected to withstand.

In what is believed to be the only such contested case in a Puerto Rico Court where the issue of jurisdiction was litigated, the United States District Court for the District of Puerto Rico held, in Lopez-Rivas v. Donovan, 629 F.Supp. 564 (D. Puerto Rico 1986), a case remarkably similar in its facts, that mere circulation of a job offer through the Wagner-Peyser system does not give Puerto Rico Courts personal jurisdiction over the grower. Said the Court, at 629 F.Supp. 567:

> "The true jurisdictional foundation of their claim is that any job offer placed in circulation through the Wagner-Peyser clearance system binds an employer to offer employment to every applicant who accepts it at any one of the local employment offices where it circulates and that employers are

> 'aware' of this when they place their offers.
>
> "We have examined the Wagner-Peyser Act, its regulations and applicable caselaw and find no support for such proposition. The adoption of plaintiffs' position would create the anomaly of employers having to hire hundreds, perhaps thousands of workers because their job offers for a limited number of positions were accepted unilaterally, without their knowledge, by applicants through the nation. We need not dwell any further on the absurdity of this notion, not to mention its due process implications and the unhealthy state-federal and state v. state tensions it would create. Plaintiffs' interpretation is not supported by the Act, the record, or agency and contract law."

If in personam jurisdiction is indiscriminately recognized in every labor-supply state where DOL has chosen to send the employer's job clearance order, no prudent employer can be

expected to continue to use the system. Moreover, the degree of predictability to the legal system promised in World-Wide Volkswagen v. Woodson, supra, at 297, is made a mockery.

C. The Issue Is Dividing the Courts - Presently It Is the Courts of Last Resort of New York and West Virginia versus the U. S. 11th Circuit Court of Appeals.

The issue is ripe for resolution by this Court. Not only is the matter of paramount importance to the viability of the Federal Employment Service System, it is seriously dividing the Courts that are being asked to decide it.

In the several cases decided to date in which the Courts have examined the effect of a grower's filing of a job clearance order under Wagner-Peyser, the Court of Last Resort of New York (1985)

4/ and now of West Virginia 5/ have granted full faith and credit to default judgments entered by Puerto Rican Courts where the grower's contact with Puerto Rico was "... deliberately set(ting) in motion the job recruitment machinery of the interstate clearance system". For example, Rios, 475 NYS2d, at 526.

The U. S. Circuit Court of Appeals for the 11th Circuit in Chery v. Bowman, 901 F.2d 1053 (11th Cir. 1990), has decided this important Federal question in direct conflict with New York and

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4/ Rios v. Altamont Farms, Inc., 64 N.Y.2d 792, 476 N.E.2d 312, 486 N.Y.S.2d 913 (1985), cert. den. 105 S. Ct. 3529 (1985) (reversing and adopting the dissent in Rios v. Altamont Farms, Inc., 475 N.Y.S.2d 520 (N.Y. App. 1984).

5/ Surrillo, et al v. Drilake Farms, Inc.,No. 20221 (W.Va. filed 11/1/91) (the decision sought to be reviewed by this Petition for Writ of Certiorari).

West Virginia. A classic situation calling for intervention by certiorari, therefore, exists.

Chery was decided by the 11th Circuit after the New York Court decided Rios but before Surrillo was decided in West Virginia. The 11th Circuit in Chery considered and flatly rejected the New York Court's reasoning in Rios even though the 11th Circuit recognized that the issue was presented in Rios in the context of a full faith and credit analysis of a judgment already entered, whereas in Chery, the issue arose on a motion for dismissal for lack of personal jurisdiction. The underlying issue in each situation was whether the filing of the job clearance order in the interstate clearance system was the minimum contact required to support due

process.

The rejection of Rios by the 11th Circuit in Chery would apply equally to Surrillo had the decision of the West Virginia Supreme Court of Appeals been rendered before Chery was decided. Rios and Surrillo breathe the same air and feed at the same trough. Neither adheres to this Court's well developed nctions of fair play and due process.

The U. S. District Court in Puerto Rico seems to have been the first Federal Court to decide the issue after the New York Court decided Rios. In Lopez-Rivas v. Donovan, supra, the Court held that mere circulation of the job order through the Wagner-Peyser system does not give Puerto Rican Courts personal jurisdiction over the grower.

State Courts not of record in

Maryland and West Virginia have sided with New York. 6/. In a group of like cases pending in the Circuit Court of Frederick County, Virginia, the Court has indicated it will follow the Chery decision of the U. S. 11th Circuit Court of Appeals 7/.

CONCLUSION

For the foregoing reasons, Drilake respectfully prays that a writ of certiorari issue to review the decision

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6/ Gregory-Ayala v. Rinehart Orchards, Inc., Civil No. 13,575 (Circuit Court for Washington County, Md., filed 1/23/86; Pagen v. Ewers Orchards, Civil Action No. 87-C-32 (Circuit Court for Hampshire County, W. Va., filed 4/1/91).

7/ Soto v. Orchard Management Company, et al, Circuit Court of Frederick County, Virginia, At Law Nos. 4027-4056. See App. C.

of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA:

JULIO SURRILLO, et al.,

vs.

DRILAKE FARMS, INC.,

WILLIAM OCASIO, et al.,

vs.

IRVIN KING, et al.,

CARMELO ROSARIO VASQUEZ,

vs.

IRVIN KING, et al.,

Case Nos. 87-C-46

87-C-47

87-C-48

ORDER

This matter came on for a decision this 17th day of September, 1990, upon the papers and proceedings formerly read

and had herein; upon the respective Motions for Summary Judgment filed by the Plaintiffs and the Defendants herein; upon a hearing held upon said Motions on the 21st day of August, 1990; upon the appearance of the parties at said hearing by counsel, Mr. Geffert, for the Plaintiffs and Mr. Printz and Mr. Johnston for the Defendants; upon the stipulation of facts filed by the parties hereto on May 29, 1990; and upon the Court taking this matter under advisement.

It appears to the Court that this matter is now mature for a decision.

The Court doth incorporate by reference herein the contents of the stipulation of facts previously filed herein on May 29, 1990, and doth adopt

the same as the Court's findings of fact herein.

Based upon said findings of fact, the Court determines that there is no genuine issue of material fact and that this is a proper case for disposition by Summary Judgment.

Plaintiffs herein concede that the Puerto Rico Secretary of Labor did not act as agent for the Defendants in this case. This concession contradicts the findings of the Superior Court of Puerto Rico, which entered the judgments in these cases, which Plaintiffs seek to have enforced in this jurisdiction under the precepts of full faith and credit. In this connection, the Court notes that the judgments of the Courts of the Commonwealth of Puerto Rico are entitled to full faith and credit in this

jurisdiction; further, it appears that there has been no fraud in the procurement of said judgments.

The essential legal issue in this case is whether the sole contact between Defendants and the Commonwealth of Puerto Rico, that is, the transmittal of Defendants clearance order by the Federal Government, is sufficient to justify the assertion of personal jurisdiction over Defendants by the Puerto Rican Courts. A New York decision, Rios v. Altamont Farms, Inc., 476 N.E. 2d 312, (1985), suggests that such constitutes sufficient minimum contact. However, the weight of the case law appears to require a contrary conclusion. The Rios Court held that the New York growers clearance orders were binding offers of employment, that

the growers could have reasonably foreseen that the clearance orders would be transmitted to the Commonwealth of Puerto Rico and that the purposes of the Wagner-Peyser Act required the Court to support the assertion of jurisdiction over New York Growers. However, it appears that the purposes for which the Wagner-Peyser Act was created might well be undercut if every grower was subject to the danger of lawsuits in every State to which the U.S. Department of Labor chose to forward the grower's clearance order. If the mere sending of a grower's clearance order to another state is enough to confer upon that state's courts long arm jurisdiction over the grower, the net effect will be to subject a grower who utilizes the

temporary foreign support program and the interstate clearance system to suits all over the country. The likelihood of abuse created by such a ruling is substantial. The result could be to discourage participation in the interstate clearance system, thus depriving U.S. workers of opportunities for employment. In Lopez-Rivas v. Donovan, 629 F. Supp. 564 (D.Puerto Rico 1986), the United States District Court in Puerto Rico made the following observation: "Stretching our limited jurisdiction on such frail grounds may work to the detriment of precisely this distressed group who have benefited and will continue to benefit from the system, in view of the likelihood of reduced job offers due to the growers'

possible abandonment of a system that would expose them to the onerous effects plaintiffs propose". Further, the Rios Court stated that the Defendants "were aware that their job offer would be forwarded to surplus labor areas such as Puerto Rico and further, were aware that, in reliance thereon, such solicited employees would foreseeably accept their offer to travel to Defendants place of business in the State of New York."

It would appear then that the Rios Court was depending upon "foreseeability" as a factor in determining the minimum contacts. However, the U.S. Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), stated that

foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause. The United States District Court in Puerto Rico in Lopez v. Rivas held that, absent the filing of a special form enabling the local employment agency to recruit, the mere placing of a job offer for farm labor in the Interstate Job Offer Clearance System created by the Wagner-Peyser Act, does not permit the employment agency to recruit workers without consulting with the employer, giving information about the applicants and obtaining confirmation and acceptance from the employer. This decision appears to be at odds with Rios. The 11th Circuit Court of Appeals in Chery v. Bowman, 901

F 2d 1053, (11th Circuit, 1990), flatly rejected Rios. The Court said: "...We are not persuaded by the New York Appellate Court's reasoning". Further, the 11th Circuit went on to say: "Even if we were to agree that an agricultural employer who uses the ICS deliberately sets in motion the job recruitment machinery of the interstate clearance system,..., we stress that the Department of Labor's act of sending the clearance orders into a state does not constitute contact with that state by the agricultural employer. The United States Government acts independently in deciding where to send the orders. And even if the transmittal of the clearance orders were a contact with Florida on the part of an employer, this single

contact is too attenuated in this case to support personal jurisdiction..." In Western Colorado Fruit Growers Association v. Marshall, 473 F. Supp. 693 (D. Colorado 1979), a United States District Court held that a clearance order was an offer of employment that could be accepted only by an individual worker reporting to the job site. This means that in this case that any contracts formed, would have been formed in the Commonwealth of Virginia or at the job site in West Virginia. In the Chery case, another apple grower case, the Winchester office transmitted grower Bowman's clearance order to states, including Florida, that the Department of Labor determined were labor surplus states. Bowman had nothing to do with

that decision. A Florida crew leader drove from Florida to Virginia looking for seasonal work and, while visiting the Winchester Employment office, learned of Bowman's needs. The crew leader met with Bowman in Virginia and was hired as a crew leader with the understanding that he would be bringing with him about 50 other workers whom the crew leader told Bowman would be coming from Florida and Maryland. Bowman offered no assistance in the travel arrangements of the crew. After the crew had arrived on the job and worked a few days, Bowman terminated a number of the crew who then sued Bowman in the Federal District Court in Florida seeking damages for alleged violations of the Migrant and Seasonal Agricultural

Workers Protection Act and the Wagner-Peyser Act. The Court held that, under these facts, Bowman did not purposefully establish minimum contacts with Florida and that the exercise of personal jurisdiction over Bowman by a Florida Court would, therefore, offend traditional notions of fairness. In doing so, that Court rejected the reasoning of the New York Court in Rios.

Upon consideration of all of which, the Court doth make the following conclusions of law: That the Plaintiffs have failed to establish that the Defendants had sufficient minimum contacts with the Commonwealth of Puerto Rico such as to give the Courts of the Commonwealth in personam jurisdiction over the Defendants. Further, it

appears, then, that the Plaintiffs' Motions for Summary Judgment must be denied and that the Defendants' Motions for Summary Judgment must be granted.

Accordingly, it is ORDERED AND ADJUDGED that the Plaintiffs' Motions for Summary Judgment in their favor be and the same are hereby denied and it is further ORDERED that the Defendants' Motions for Summary Judgments be and the same are hereby granted and these actions are dismissed and the Defendants herein are awarded their costs in this behalf expended.

It appearing that this matter has come to an end, the Clerk shall retire these actions from the active docket and place the same among causes ended.

The Court notes the timely

exception of the Plaintiffs to all adverse rulings herein.

The Clerk will enter the foregoing as and for the day and date first above written and forward attested copies hereof to all counsel of record.

/s/ Thomas W. Steptoe, Jr.

Judge of the Circuit Court

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JULIO SURRILLO, et al.,

vs.

DRILAKE FARMS, INC.,

WILLIAM OCASIO, et al.,

vs.

IRVIN KING, et al.,

CARMELO ROSAIRO VASQUEZ,

vs.

IRVIN KING, et al.,

Case Nos. 87-C-46

87-C-47

87-C-48

ORDER

This matter came on for a decision this 20th day of December, 1990, upon

the papers and proceedings formerly read and had herein; upon the Order of this Court of September 17, 1990, granting Summary Judgment in favor of the Defendants in the consolidation cases herein; upon the Plaintiffs' Motion for Rehearing and to Amend or Alter the judgment previously filed herein; upon a hearing held upon said Motion on the ___ day of November, 1990; upon the appearance at said hearing of the Plaintiffs by counsel, Garry G. Geffert, Esquire; upon the appearance at said hearing of the Defendants by counsel, William A. Johnston, Esquire; and upon the Court taking this matter under advisement.

It appears to the Court that this matter is now mature for a decision.

On the second page of the Court's

Opinion of September 17, 1990, the Court noted: "Plaintiffs herein concede that the Puerto Rico Secretary of Labor did not act as agent for the Defendants in this case. This concession contradicts the findings of the Superior Court of Puerto Rico, which entered the judgments in these cases, which Plaintiffs seek to have enforced in this jurisdiction under the precepts of full faith and credit..." This is not correct. While the Plaintiffs conceded that there was no express or written agency agreement between Defendants and the Puerto Rico Department of Labor, it is the position of the Plaintiffs that an implied agency could have been found to have existed by the Superior Court of Puerto Rico, which, indeed, found that an agency existed. It is further the position of

the Plaintiffs that this Court should be bound by such finding unless it is shown to be clearly wrong.

The essential question for this Court, then, is whether such a correction of the findings of this Court should lead to an opposite result. The parties have stipulated that the Plaintiffs were recruited for work with Defendant by the Puerto Rico Department of Labor and Human Resources offices in Puerto Rico, which is the state agency in Puerto Rico which is a part of the U. S. Employment Service. The parties have also stipulated that at no time did Defendant execute a delegation of hiring authority (Form ES 569) form authorizing either the U.S. Department of Labor or the Puerto Rican Department of Labor and Human Resources to act as agent for the

purposes of hiring. However, when submitting the clearance order and applying for temporary labor certification, Defendants signed the required assurance that it would cooperate with the employment service system and the active recruitment of U.S. workers. Since the employment service system provided for the creation of an agency by the execution of a governmental form and that such a process was not followed herein, the Court is of the opinion that no implied agency could have arisen and that the conclusory finding of agency by the Superior Court of Puerto Rico is clearly wrong. The Defendants' execution of documentation that they would cooperate with the employment service system in the act of recruitment of U.S. workers

was not enough under the case law to bestow in personam jurisdiction over Defendants on the Courts of Puerto Rico. This Court specifically rejects the analysis of the New York Court in Rios v. Altamont Farms, Inc., 476 N.E. 2d 312, as being contrary to the weight of authority.

Accordingly, it is ORDERED and ADJUDGED that this Court's Opinion of September 17, 1990, is amended to delete the following language found on Page 2 of said Opinion, to-wit: "Plaintiffs herein concede that the Puerto Rico Secretary of Labor did not act as agent for the Defendants in this case. This concession contradicts the findings of the Superior Court of Puerto Rico, which entered the judgments in these cases, which Plaintiffs seek to have enforced

in this jurisdiction under the precepts of full faith and credit." And, further, said Opinion is amended by the inclusion of the following language instead of the foregoing: "While the Plaintiffs have conceded that there was no express or written agency agreement between Defendants and the Puerto Rico Department of Labor, the Plaintiffs argue that an implied agency could have been found by the Superior Court of Puerto Rico and, further, argue that this Court should be bound by such finding unless it is shown to be clearly wrong. For the reasons stated in this Opinion, this Court finds such conclusiory finding by the Superior Court of Puerto Rico to be clearly wrong."

It is further ORDERED that in all

other respects said opinion of September 17, 1990, shall remain in full force and effect.

The Court notes the timely exception of the Plaintiffs to the ruling of the Court herein.

The Clerk will enter the foregoing as and for the day and date first above written and forward attested copies hereof to all counsel of record.

/s/ Thomas W. Steptoe, Jr.

Judge of the Circuit Court

APPENDIX B

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1991 Term

No. 20221

JULIO SURRILLO, ET AL.,
Plaintiffs Below, Appellants

v.

DRILAKE FARMS, INC.,
Defendant Below, Appellee

WILLIAM OCASIO, ET AL.,
Plaintiffs Below, Appellants

v.

IRVIN KING, ET AL.,
Defendants Below, Appellees

CARMELO ROSAIRO VASQUEZ,
Plaintiff Below, Appellant

v.

IRVIN KING, ET AL.,
Defendants Below, Appellees

Appeal from the Circuit Court of
Jefferson County
Honorable Thomas W. Steptoe, Jr., Judge
Civil Action Nos. 87-C-46,
87-C-47, 87-C-48
Reversed and Remanded With Instructions

Submitted: September 11, 1991
Filed: November 1, 1991

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The Opinion of the Court was delivered PER CURIAM.

Justice Neely dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "'Under Section 1, Article IV of the Constitution of the United States, the judgment or decree of a court of record of another state will be given full faith and credit in the courts of this State, unless it be clearly shown by pleading and proof that the court of such other state was without jurisdiction to render the same, or that it was procured through fraud.' Syllabus Point 1, Johnson v. Huntington Moving & Storage, Inc., 160 W. Va. 796, 239 S.E.2d 128 (1977)." Syllabus Point 2, Gonzalez Perez v. Romney Orchards, Inc., ____ W. Va. ____, 399 S.E.2d 50 (1990).

2. "The Due Process Clause of the Fourteenth Amendment to the United

States Constitution operates to limit the jurisdiction of a state court to enter a judgment affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant." Syllabus Point 1, Pries v. Watt, ____ W. Va. ____, ____ S.E.2d ____ (No. 20245 10/17/91).

3. "In order to obtain personal jurisdiction over a nonresident defendant, reasonable notice of the suit must be given the defendant. There also must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state." Syllabus

Point 2, Pries v. Watt, ____ W. Va. ____, ____ S.E.2d ____ (No. 20245 10/17/91).

4. "To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state." Syllabus Point 3, Pries v. Watt, ____ W. Va. ____, ____ S.E.2d ____ (No. 20245 10/17/91).

Per Curiam:

In this appeal, we are asked to determine whether the Circuit Court of Jefferson County was correct in holding that judgments obtained in Puerto Rico against the defendants below, Drilake Farms, Inc., a West Virginia corporation, and Irvin King, a resident of Jefferson County and officer of the aforementioned corporation, were unenforceable in this State. The defendants asserted that the Puerto Rican courts lacked personal jurisdiction over the defendants, thereby precluding enforcement of the judgments.

The material facts are undisputed. The defendants are apple growers. In

1978, they wanted to hire temporary foreign laborers to harvest their fall crop. The federal government, however, permits the hiring of such workers only if qualified citizens of the United States are not available for such employment. Accordingly, employers desiring to hire foreign labor must first file with the local employment office an application for temporary foreign labor certification and a statement of the terms and conditions of employment. If workers are not available locally, a clearance order, containing the terms and conditions of employment, is circulated to other employment offices throughout the state. If the job cannot be filled on the state level, the clearance order is distributed through the United States

Department of Labor to employment offices in other areas of the nation. Permission to import temporary foreign labor is granted only if a sufficient number of domestic workers cannot be recruited through this process. 1/

On April 28, 1978, the defendants filed with the local employment office in Winchester, Virginia, an application to recruit 27 Jamaican laborers to work in their orchards for a two-month period in the fall. It does not appear that any workers were recruited on the local or state level, because on August 2, 1978, a clearance order containing the

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1/ For a more detailed analysis of the interstate clearance system, as well as references to the appropriate statutes and regulations, see Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982).

defendants' job offer was forwarded to Puerto Rico. 2/ The Puerto Rican employment service set to work recruiting and screening applicants, obtaining the necessary documentation, and arranging for transportation to the defendants' job site.

By letter dated August 16, 1978, the Department of Labor advised the

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2/ In April of 1978, Puerto Rican workers were considered "unavailable" for employment because Puerto Rico statutorily set minimum terms and conditions of employment higher than those required by the Department of Labor. See Hernandez Flecha v. Quiros, 567 F.2d 1154 (1st Cir. 1977), cert. denied, 436 U.S. 945, 56 L. Ed. 2d 786, 98 S. Ct. 2846 (1978). In July of 1978, however, legislation was enacted to allow exemptions from these requirements in certain circumstances. The defendants' clearance order was subsequently forwarded at the request of the Puerto Rican government.

defendants that they would be allowed to recruit only eight Jamaican workers because nineteen Puerto Ricans were "available" to fill the jobs offered. On September 8, 1978, twenty-seven Puerto Rican workers, including the plaintiffs below, arrived in Winchester, Virginia. The defendants provided the plaintiffs with work, but fired them all within a few days.

The plaintiffs subsequently brought suit for damages in Puerto Rico, claiming that the defendants had breached their contracts of employment. Although the defendants were notified of the filing of the lawsuits, they made no personal appearance in the Puerto Rican courts, and default judgments were entered against them.

On February 18, 1987, the plaintiffs instituted proceedings in the Circuit Court of Jefferson County to enforce the Puerto Rican judgments. Both sides moved for summary judgment. By order dated December 20, 1990, the circuit court ruled that the Puerto Rican courts did not have personal jurisdiction over the defendants and that the default judgments were, therefore, not enforceable in West Virginia. The plaintiffs appeal from the circuit court's decision granting summary judgment in favor of the defendants.

We start with the principles we recently restated in Syllabus Point 2 of Gonzalez Perez v. Romney Orchards, Inc., ____ W. Va. ____, 399 S.E.2d 50 (1990):

> "'Under Section 1, Article IV of the Constitution of the United States, the judgment or decree of a court of record of another state will be given full faith and credit in the courts of this State, unless it be clearly shown by pleading and proof that the court of such other state was without jurisdiction to render the same, or that it was procured through fraud.' Syllabus Point 1, Johnson v. Huntington Moving & Storage, Inc., 160 W. Va. 796, 239 S.E.2d 128 (1977)." 3/

In Syllabus Point 4 of Lemley v. Barr, ____ W. Va. ____, 343 S.E.2d 101 (1986), we stated:

> "'"If the court, which rendered the judgment, was a court of general jurisdiction, the presumption is it had jurisdiction of the particular case, and to render the

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3/ In Gonzalez-Perez, we stated: "Judgments from the courts of Puerto Rico are...entitled to the same principles of full faith and credit as are judgments of the states under Article IV, Section 1 of the United States Constitution." ____ W. Va. at ____ n.10, 399 S.E.2d at 54 n.10.

> judgment void, this presumption must be overcome by proof.["] Syl. Pt. 3, Gilchrist v. O. & O.L. Co., 21 W. Va. 115 (1882).' Syl. Pt. 2, Fortner v. Fortner, [186 W. Va. 70], 282 S.E.2d 48 (1981)."

The burden of establishing that the foreign court lacked jurisdiction rests upon the party attacking the judgment. Lemley v. Barr, supra. See Cook v. Cook, 342 U.S. 126, 96 L. Ed. 146, 72 S. Ct. 157 (1951).

The defendants here assert that the Puerto Rican courts lacked jurisdiction of their persons. In Syllabus Points 1 and 2 of Pries v. Watt, ____ W. Va. ____, ____ S.E.2d ____ (No. 20245 10/17/91), we stated:

> "1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution operates to limit the jurisdiction of a state court to enter a judgment

> affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant.
>
> "2. In order to obtain personal jurisdiction over a nonresident defendant, reasonable notice of the suit must be given the defendant. There also must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state."

See Kulko v. Superior Court, 436 U.S. 84, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978); International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945). The only issue in this case is whether the defendants had sufficient contacts with Puerto Rico to establish personal jurisdiction.

In Syllabus Point 3 of Pries, we discussed the minimum contacts issue:

> "To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state."

See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980); Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). In Kulko v. Superior Court, the Supreme Court noted that "the 'minimum contacts' test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be

weighed to determine whether the requisite 'affiliating circumstances' are present." 436 U.S. at 92, 56 L. Ed. 2d at 141, 98 S. Ct. at 1697, quoting Hanson v. Denckla, 357 U.S. at 246, 2 L. Ed. 2d at 1293, 48 S. Ct. at 1235. Minimum contacts can be established even where the defendant has never physically entered the forum state. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

The defendants assert that they had no contact whatsoever with Puerto Rico except the clearance order forwarded there by the Department of Labor. They state that they initiated the clearance order only because they were required by law to do so in order to hire foreign

workers and maintain that the clearance order was forwarded to Puerto Rico without any request from them. The defendants also point out that they had no contact with or from anyone in Puerto Rico after the clearance order was forwarded there. They argue that these facts demonstrate that they did not purposefully avail themselves of the benefits available in the forum state so as to support the Puerto Rican courts' exercise of jurisdiction.

A similar argument was put forward in Rios v. Altamont Farms, Inc., 100 A.D.2d 405, 475 N.Y.S.2d 520 (1984), rev'd, 64 N.Y.2d 792, 486 N.Y.S.2d 913, 476 N.E.2d 312, cert. denied, 473 U.S. 905, 87 L. Ed. 2d 653, 105 S. Ct. 3529 (1985). The facts in Rios are virtually

identical to those presented here: Puerto Rican migrant farm workers transported to New York for the 1978 apple harvest sought to enforce in New York default judgments entered in Puerto Rico against New York apple growers for breach of contract and tort claims. The Appellate Division found that the growers had no contact with Puerto Rico except the clearance orders which were forwarded to Puerto Rico at the direction of the Department of Labor and not at the request of the growers. The court also noted that when the growers initiated the process, it was their intent to recruit foreign, not Puerto Rican, workers. For these reasons, the intermediate appellate court concluded that "the fortuitous nature of defendants' sole contact with Puerto

Rico is insufficient to satisfy the requirements of due process." 100 A.D.2d at 410, 475 N.Y.S.2d at 425.

The Court of Appeals reversed, without further elaboration, "for reasons stated in the dissenting opinion by Justice...Levine at the Appellate Division[.]" 64 N.Y.2d at 794, 486 N.Y.S.2d at 913, 476 N.E.2d at 312. That dissenting opinion challenged the majority's conclusion that because the growers had not overtly recruited or expressly requested that the clearance order be circulated in Puerto Rico, they did not purposefully act to obtain benefits there. Justice Levine found that by filing applications containing offers to contract and the terms and conditions of employment with the local

employment office, the growers

> "deliberately set in motion the job recruitment machinery of the interstate clearance system. Thus, defendants did not merely acquiesce in the transmission of the clearance orders to other States and territories; each of them purposefully sent into the stream of interstate commerce a legally operative written instrument to be used both as a means of recruiting out-of-State labor and as the basis for contracts of employment with responding workers." 100 A.D.2d at 415, 475 N.Y.S.2d at 526.

The dissenting justice noted:

> "The offers to contract were physically delivered and distributed in Puerto Rico. Arguably, the offers were accepted there when plaintiffs made commitments to fill the harvesting positions, so that formation of the contracts was completed in Puerto Rico. At the least, significant preliminary steps leading to contract formation took place in Puerto Rico, including the performance of various conditions that defendants stipulated for in the

> clearance orders. These preliminary steps, including the making of commitments, obtaining medical and police clearances, advancing the costs of air transport and actual embarkation, constituted either part performance or foreseeable detrimental action in reliance so as to have made defendants' offers irrevocable and legally binding before any plaintiff set foot in New York[.]" 100 A.D.2d at 416, 475 N.Y.S.2d at 527.

Justice Levine also noted that the growers were "well aware that their clearance orders reached Puerto Rico and were being acted upon there," as evidenced by "communications concerning the progress of recruitment." 100 A.D.2d at 415, 475 N.Y.S.2d at 526. The dissenting justice found that the recruitment and screening of workers, which took place in Puerto Rico, was undertaken for the benefit of the

growers. Justice Levine concluded:

> "For their own commercial self-interest, defendants elected to import migrant workers through the channels of interstate commerce. They further elected to take advantage of the expense-free hiring procedures of the interstate clearance system. These purposeful acts were undertaken with certain awareness that job offers would be disseminated and acted upon in Puerto Rico. They availed themselves of recruitment, screening and logistical services created under Puerto Rican laws and performed by Commonwealth employees. The conclusion is, therefore, inescapable that defendants purposefully and knowingly availed themselves of the benefits and protections established by Puerto Rican law." 100 A.D.2d at 416, 475 N.Y.S.2d at 527.

Much the same result was reached in Garcia v. Vasquez, 524 F. Supp. 40 (S.D. Tex. 1981), where a North Carolina farmer initiated a clearance order seeking migrant farm workers to harvest

cucumbers. The clearance order eventually reached the Texas Employment Commission (T.E.C.) where the plaintiffs learned of the offer. A number of workers responded, but when they arrived in North Carolina, they discovered that the wages, hours and availability of housing were not as promised. The plaintiffs filed suit in Texas, and the North Carolina farmer raised the issue of personal jurisdiction under the Due Process Clause. The court rejected this argument stating:

> "Due process requirements are also fulfilled. Defendant Keech purposefully issued the job information in North Carolina. The T.E.C. officials merely acted on his behalf in processing the information. The privilege of conducting activities in Texas was intentionally invoked by Keech. This cause of action plainly arises from and is connected with the alleged

Texas transaction." 524 F. Supp. at 42.

In Runnels v. TMSI Contractors, Inc., 764 F.2d 417 (5th Cir. 1985), a Saudi Arabian limited partnership solicited the plaintiff, a Louisiana resident, to come to work for it in Saudi Arabia. The partnership had placed job advertisements in two Louisiana newspapers and its resident agent in California had mailed sample and actual contracts to the plaintiff at his home in Louisiana. The plaintiff took the job and worked in Saudi Arabia for over a year before he was fired. The plaintiff brought suit in Louisiana district court for wrongful discharge. In concluding that the Louisiana court had personal jurisdiction of the foreign partnership, the Fifth Circuit Court of

Appeals stated:

> "Because TMSI Arabia solicited Louisiana residents through local advertising and through its agent, because its contacts with Louisiana were deliberate rather than fortuitous, and because it could reasonably foresee that contract disputes would likely arise as a result of its solicitation of United States citizens, it is not unfair to require that TMSI Arabia defend this suit in Louisiana." 764 F.2d at 423.

Applying these principles to the case at bar, it seems clear that the defendants purposefully availed themselves of the Puerto Rican government's employment services in order to solicit workers at stated contract terms and that this solicitation resulted in Puerto Rican workers agreeing to the terms which were communicated to the defendants. Although the defendants desired to hire

foreign workers, they were aware that they were required by law to exhaust the pools of domestic labor. With this knowledge, they deliberately set in motion the hiring procedures of the interstate clearance system. Although they did not request that the clearance order be forwarded to Puerto Rico, they were apparently aware that it would go there if an insufficient number of workers were found in Virginia. Moreover, while the defendants initiated no direct contact with Puerto Rico, they apparently did have knowledge that recruiting was taking place there on their behalf through the local employment office. No later than mid-August, the defendants were advised that a number of Puerto Rican workers had been found to fill, at least in

part, the jobs the defendants had available. The defendants did nothing to reject these workers or to discourage further recruiting. When the Puerto Rican workers arrived at the defendants' work site, the defendants even provided them with work for several days before firing them. Under these circumstances, we believe it was reasonably foreseeable that the defendants would be sued in Puerto Rico.

The defendants, however, argue that this case is controlled by the ruling in Lopez-Rivas v. Donovan, 629 F. Supp. 564 (D. Puerto Rico 1986), in which Puerto Rican farm workers who had responded to clearance orders like those of the defendants alleged that the growers' failure to transport them to the job

site and provide them with work gave rise to a federal claim for damages. The district court concluded that

> "absent a special form enabling the local employment agency to recruit, the mere placing of a job offer in the clearance system does not permit the employment agency to recruit workers for a particular job offer without consulting with the employer, giving information about the applicants and obtaining confirmation and acceptance from the employer." 629 F. Supp. at 568.

The defendants assert that this case demonstrates that they had no agency relationship with the Puerto Rican employment service which would establish sufficient minimum contacts with Puerto Rico to warrant the exercise of personal jurisdiction in the courts there. We note, however, that the question of personal jurisdiction did not arise in Lopez-Rivas; the only issue

decided was whether the court had jurisdiction of the subject matter. 4/

The defendants also cite Western Colorado Fruit Growers Association, Inc. v. Marshall, 473 F. Supp. 693 (D. Colo. 1979), wherein the government sued Colorado fruit growers for failure to transport and to employ domestic workers recruited pursuant to their clearance orders. The clearance orders specified that the job offer could be accepted only by the appearance of the workers at the specific location. The court

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4/ Although the growers in Lopez-Rivas did challenge the personal jurisdiction of the Puerto Rico district court, the court ruled: "Regardless of the validity of the defendants'... personal jurisdiction...arguments, the court considers the challenge to our subject matter jurisdiction as fundamental and dispositive of plaintiffs' claims[.]" 629 F. Supp. at 567.

concluded that since none of the workers complied with this condition of employment, there was no contractual relationship which would give rise to the cause of action pressed by the government. See also Lopez-Rivas v. Donovan, supra.

The defendants argue that because the plaintiffs here, like those in Western Colorado Fruit Growers, did not contact the employment office in Winchester to accept employment, 5/ they

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5/ The defendants' clearance order contained the following instructions for prospective job applicants: "Referral of crews and of individuals shall be made through the Winchester local office in order to ascertain current employment, crop, and housing information and to enable proper arrangements to be made." The form also stated that collect calls would be accepted at the Winchester office of the Virginia Employment Commission and included the office address, the name of the farm placement supervisor, and the telephone number.

have no contractual relationship which affords minimum contacts with Puerto Rico. We note, however, that in neither Western Colorado Fruit Growers nor Lopez-Rivas did the prospective workers actually appear at the prospective job site. In this case, the plaintiffs not only appeared, they also were transported to the job site and, after arriving, were actually provided with work by the defendants.
Any technical defect in their manner of acceptance was clearly waived by the actions of the defendants.

The defendants also rely on Chery v. Bowman, 901 F.2d 1053 (11th Cir. 1990), in which migrant farm workers from Florida sued a Virginia fruit grower for violation of federal statutes

designed to protect such workers. The grower initiated recruitment procedures through the interstate clearance system, and his clearance order was transmitted to various states, including Florida. Meanwhile, the plaintiff, a Florida resident, drove to Virginia looking for work and learned of the grower's offer from the local employment office. The grower subsequently hired the plaintiff with the understanding that he would bring about fifty men, recruited from Maryland and Florida, with him for harvest. After the plaintiff's crew had worked for several days, the grower fired a number of them. The plaintiff and other discharged workers filed a diversity action in federal district court in Florida, but the case was dismissed for lack of personal

jurisdiction over the grower.

The Court of Appeals upheld the lower court, noting that "the Department of Labor's action [in forwarding the clearance order to Florida] does not constitute purposeful availment of the benefits of Florida law by [the grower]." 901 F.2d at 1056. The court in Chery refused to follow the New York court in Rios, recognizing that the two cases were clearly distinguishable factually: None of the plaintiffs in Chery had been hired as a result of the clearance orders being sent to Florida. As the court stated: "In Rios, unlike this case, the defendant apple growers received substantial benefits from the forum state's (Puerto Rico's) labor department in recruiting and processing

the laborers who ultimately became the plaintiffs." 901 F.2d at 1057.

For the foregoing reasons, we conclude that the defendants have failed to overcome the presumption, arising under the Full Faith and Credit Clause under Section 1 of Article IV of the United States Constitution, that the Puerto Rican courts had jurisdiction to enter default judgments against them. Because the defendants did not clearly demonstrate that the Puerto Rican courts lacked personal jurisdiction over them, the circuit court erred in granting summary judgment in their favor. Accordingly, the judgment of the Circuit Court of Jefferson County is reversed, and the case is remanded to that court with instructions to enter summary

judgment in favor of the plaintiffs below.

Reversed and remanded with instructions.

No. 20221 - Julio Surrillo, et al. v. Drilake Farms, Inc. v. William Ocasio, et al. v. Irvin King, Carmelo Rosairo Vasquez v. Irvin King, et al.

Neely, J., dissenting:

I dissent on the grounds that the undisputed facts demonstrate conclusively that there were no contacts with Puerto Rico sufficient to justify jurisdiction under International Shoe Co. v. Washington, 326 U.S. 310 (1945). Complying with appropriate rules and regulations of the government of the United States does not constitute a "contact" with any other state or territory, and being "apparently aware" (supra, p. 11) does not constitute a jurisdiction-giving voluntary act.

While the majority pays lip service

to the "minimum contacts" test by citing International Shoe; Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980); and Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958), they effectively ignore U. S. Supreme Court precedent by quoting from a dissent by a New York intermediate level court (supra, pp. 7-9). The majority may cite Asahi and World-Wide Volkswagen as often as they like, and quote as many pages of Justice Levine's dissent as they like, but pages and pages of citations will make the majority no less wrong.

APPENDIX C

COMMONWEALTH OF VIRGINIA

[SEAL]

Twenty-Sixth Judicial Circuit

September 13, 1984
[Dictated September 11, 1984]

Steven D. Rosenfield, Esquire
Wyatt & Rosenfield
917 East Jefferson Street
Charlottesville, Virginia 22901

William A. Johnston, Esquire
Harrison & Johnston
Post Office Box 809
Winchester, Virginia 22601

Re: Fernandos Varges Soto, et al
v. Orchard Management Company,
et al - Circuit Court of Frederick
County - Law Nos. 4027-4056

Gentlemen:

Based on the pleadings and stipulation of facts in these consolidated cases I have decided to sustain defendants' motion for summary judgment. Plaintiffs filed brief in support of their motion for summary

judgment but I do not find that one was filed. If this were an oversight, to make the record complete leave is granted to plaintiffs to file such a motion nunc pro tunc.

I wish to congratulate counsel for the excellence of the briefs filed, which were of great assistance to the Court. Considering this and other circumstances it is still my intention, hopefully in the near future, to write an opinion setting forth the reasons for my ruling.

Yours very truly,

/s/ Robert K. Woltz

Robert K. Woltz

Judge

h

Original to Court File

APPENDIX D

STATUTORY PROVISIONS

RULES OF CIVIL PROCEDURE, THE COMMONWEALTH OF PUERTO RICO, 32 L.P.R.A App. II, Rule 4.7(a):

4.7 Substitute service

(a) Where the person to be served is not within Puerto Rico, the General Court of Justice of Puerto Rico shall have personal jurisdiction over said nonresident as if he were a resident of the Commonwealth of Puerto Rico, if the action or claim arises as a result of the following:

(1) Such person or his agent carries out business transactions within Puerto Rico; or

(2) Executes by himself or through his agent, tortious acts within Puerto Rico; or

(3) Meets with an accident while by himself or through his agent driving a motor vehicle in Puerto Rico; or

(4) Meets with an accident in Puerto Rico in the operation, by himself or through his agent, of a freight or passenger-transportation business in Puerto Rico or between Puerto Rico and the United States or between Puerto Rico and a foreign country, or the accident occurs outside of Puerto Rico in the operation of such business, when the contract has been executed in Puerto Rico; [or]

(5) Is the owner, or by himself, or through his agent, uses or owns real property located in Puerto Rico.

THE WAGNER-PEYSER ACT OF 1933, 29 U.S.C. § 49:

§49. UNITED STATES EMPLOYMENT SERVICE; ESTABLISHMENT IN DEPARTMENT OF LABOR; STATEMENT OF PURPOSE

In order to promote the establishment and maintenance of a national system of public employment offices, the United States Employment Service shall be established and maintained within the Department of Labor.

THE WAGNER-PEYSER ACT OF 1933, 29 U.S.C. § 49b(a):

§ 49b. DUTIES OF SERVICE AND SECRETARY

(a) SCOPE OF ASSISTANCE BY SERVICE, STANDARDS OF EFFICIENCY; PROBLEMS OF LOCALITIES; UNIFORMITY OF ADMINISTRATIVE AND STATISTICAL PROCEDURES; INFORMATION; EMPLOYMENT OPPORTUNITIES AND OPERATION OF

SYSTEM; INTERSTATE LABOR CLEARING SYSTEM

The United States Employment Service shall assist in coordinating the State public employment services throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the States.

IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. § 1101(a)(15)(H):

(a) As used in this chapter-

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens-

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is

coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this

paragraph if accompanying him or following to join him;

IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. § 1184(c):

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the

alien is a nonimmigrant.

IMMIGRATION AND NATURALIZATION SERVICE, 8 C.F.R. § 214.2(h)(3):

(3) PETITION FOR ALIEN TO PERFORM TEMPORARY SERVICE OR LABOR-(i) LABOR CERTIFICATION. Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101 (a)(15)(H)(ii) of the Act. If there is

attached to the petition a notice from the Secretary of Labor or his designated representative that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

SUBPART F-AGRICULTURAL CLEARANCE ORDER ACTIVITY

§ 653.500 PURPOSE AND SCOPE OF SUBPART.

This section contains the requirements for acceptance and handling of intrastate and interstate job clearance orders seeking workers to

perform agricultural or food processing work on a less than year round basis. Orders seeking workers to perform agricultural or food processing work on a year round basis which involves permanent relocation are not subject to the requirements of this subpart. This section, therefore, contains requirements which affect not only applicants who are categorized as MSFWs based on their past employment, but all workers who are recruited through the JS intrastate and interstate clearance systems for less than year round agricultural or food processing work.

§ 653.501 REQUIREMENTS FOR ACCEPTING AND PROCESSING CLEARANCE ORDERS.

(a) In view of the statutorily established basic function of the job

service as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order accepted or recruited upon by the JS constitute a contractual job offer to which the ETA or a State agency is in any way a party. Nevertheless, if the ETA or a State agency discovers that an employer's job order contains a material misrepresentation, the procedures of Subpart F of Part 658 of this chapter shall be followed.

(b) Intrastate and interstate job orders shall include the language of the first two sentences of paragraph (a) of

this section.

(c) No local office or State agency shall place into intrastate or interstate clearance any job order seeking workers to perform agricultural or food processing work before reviewing it pursuant to paragraphs (d) or (e) of this section, as applicable.

(d) No local office shall place a job order seeking workers to perform agricultural or food processing work into intrastate clearance unless:

(1) The job order does not contain an unlawful discriminatory specification by race, color, religion, national origin, age, sex, or mental or physical status unrelated to job performance (handicap);

(2) The employer has signed the job order and the job order states all the

material terms and conditions of the employment, including:

(i) The crop;

(ii) The nature of the work;

(iii) The anticipated period and hours of employment;

(iv) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;

(v) An assurance that:

(A) The employer will provide to workers referred through the clearance system the number of hours of work cited in paragraph (d)(2)(iv) of this section for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 working days prior to the original date of need (pursuant to

paragraph (d)(2)(xiii) of this section) by so notifying the order-holding office. The State agency shall make a record of this notification and shall attempt to inform referred migrant workers of the change in accordance with the following procedure:

(B) All workers referred through the clearance system, farm labor contractors on behalf of migrant workers or family heads on behalf of migrant family members referred through the clearance system shall be notified to contact a local job service office, preferably the order-holding office, to verify the date of need cited no sooner than 9 working days and no later than 5 working days prior to the original date of need cited on the job order; and that failure to do so will disqualify the

referred migrant worker from the assurance provided in paragraphs (a) and (d) of this section.

(C) If the worker referred through the clearance system contacts a local office (in any State) other than the order holding office, that local office shall assist the referred worker in contacting the order holding office on a timely basis. Such assistance shall include, if necessary, contacting the order holding office by telephone or other timely means on behalf of the worker referred through the clearance system.

(D) If the employer fails to notify the order-holding office at least 10 working days prior to the original date of need the employer shall pay eligible (pursuant to paragraph (b) of this

section) workers referred through the clearance system the specified hourly rate of pay, or in the absence of a specified hourly rate of pay, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need.

(E) Employers may require workers to perform alternative work if the guarantee in this section is invoked and if such alternative work is stated on the job order.

(F) For the purposes of this assurance, "working days" shall mean those days that the order-holding local office is open for public business.

(vi) The hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size;

(vii) Any deductions to be made from wages;

(viii) A specification of any non-monetary benefits to be provided by the employer;

(ix) Any hours, days or weeks for which work is guaranteed, and, for each guaranteed week of work except as provided in paragraph (d)(2)(v) of this section, the exclusive manner in which the guarantee may be abated due to weather conditions or other acts of God beyond the employer's control;

(x) Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made. No such

payments, however, shall be made contingent upon the worker continuing employment beyond the period of employment specified in the job order or, in the case of any worker with children, beyond the time needed to return home for the beginning of the school year;

(xi) An assurance that no extension of employment beyond the period of employment specified in the job order shall relieve the employer from paying the wages already earned, or if specified in the job order as a term of employment, providing transportation or paying transportation expenses to the worker's home;

(xii) Assurances that the working conditions comply with applicable Federal and State minimum wage, child

labor, social security, health and safety, farm labor contractor registration and other employment-related laws;

(xiii) An assurance that the employer will expeditiously notify the order-holding local office or State agency by telephone immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment or other factors have changed the terms and conditions of employment. For orders submitted in conjunction with requests for foreign workers, an assurance that the employer will follow-up the telephone notification in writing.

(xiv) An assurance that the employer, if acting as a farm labor contractor ("FLC") or farm labor

contractor employee ("FLCE") on the order, has a valid FLC certificate or FLCE identification card; and

(xv) An assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.

(xvi) An assurance that outreach workers shall have reasonable access to the workers in the conduct of outreach activities pursuant to § 653.107.

(3) The job order contains all the material terms and conditions of the

job, and the employer assures that all items therein are actual conditions of the job by signing the following statement: "This job order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job";

(4) The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. If the wages offered are expressed as piece rates or as base rates and bonuses, the employer shall make the method of calculating the wage and supporting materials available to JS

staff who shall check if the employer's calculation of the estimate hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher;

(5) The employer has agreed to provide or pay for the transportation of the workers and their families on at least the same terms as transportation is commonly provided by employers in the area of intended employment to agricultural workers and their families recruited from the same area of supply;

(6) JS staff have determined, through a preoccupancy housing inspection performed by JS staff or other appropriate public agencies, that the housing assured by the employer is in fact available, and meets the full

set of standards set forth at 20 CFR Part 654, Subpart E which details applicable housing standards and contains provisions for conditional access to the clearance system; except that mobile range housing for sheepherders shall meet existing Departmental guidelines; and

(7) The local office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area, or the local office anticipates a shortage of local workers.

(e) No state agency shall place a job order seeking workers to perform agricultural or food processing work with interstate clearance unless:

(1) The job order meets the requirements set forth at paragraphs

(d)(1) through (d)(6) of this section;

(2) The State agency and the employer have attempted and have not been able to locate sufficient workers within the state, or the State agency anticipates a shortage of workers within the State; and

(3) The order has been reviewed and approved by the ETA regional office within 10 working days after receipt from the State agency, and the Regional Administrator has approved the areas of supply to which the order shall be extended. Any denial by the Regional Administrator shall be in writing and set forth the reasons for the denial.

(f)(1) The local office shall use the agricultural clearance form prescribed by ETA, and shall see that all necessary items on the form are

completed, including items on attachments to the form prescribed by ETA.

(2)(i) The original of an interstate agricultural clearance form shall be retained for the order-holding local office files. If the clearance order is submitted in conjunction with a request for certification of temporary alien agricultural workers, the procedures at 20 CFR 655.204(a) shall be followed. For other clearance orders, the order-holding local office shall transmit a complete copy to the State office. The State office shall distribute additional copies of the form with all attachments except that the State agency may, at its discretion, delegate this distribution to the local office, as follows:

(A) At least one clear copy to each of the State agencies selected for recruitment (areas of supply);

(B) One copy to each applicant-holding ETA regional office;

(C) One copy to the order-holding ETA regional office; and

(D) One copy to the Regional Farm Labor Coordinated Enforcement Committee in the area of employment, Attn: ESA Regional Administrator.

(ii) Applicant-holding offices shall provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. The checklist shall include language notifying the worker that a

copy of the complete order is available for inspection. One copy of the form with all attachments shall be available for inspection in the applicant-holding office and the order-holding office. State agencies shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator.

(iii) The applicant-holding office shall give each referred worker a copy of a description of worker's rights developed by the National Farm Labor Coordinated Enforcement Committee.

(g) The local office may place an intrastate or interstate order seeking workers to perform agricultural or food processing work for a specific farm labor contractor or worker preferred by the employer provided the order meets JS

nondiscrimination criteria. The order would not meet such criteria, for example, if it requested a "white male crew leader" or "any white male crew leader."

(h) In local offices which have been designated significant MSFW bilingual offices by ETA, and in any other local office with bilingual staff, bilingual (English-Spanish) staff shall assist all agricultural workers, upon request, to understand the terms and conditions of employment set forth in intrastate and interstate job orders and shall provide such workers with checklists in Spanish showing wage payment schedules, working conditions and other material specifications of the job order.

(i) No agricultural or food

processing order shall be included in job bank listings available outside the local office commuting area unless the order has been processed according to requirements for intrastate or interstate clearance contained in this subpart. If the job bank for the local office area incorporates offices beyond the local office commuting area, the order may be included in the listing but must be clearly designated as prohibiting referral from outside the community area, unless the requirements of this subpart are met.

(j) If the labor supply State agency accepts a clearance order, the State agency shall actively recruit workers for referral. In the event a potential labor supply State agency rejects a clearance order, the reasons

for rejection shall be documented and submitted to the Regional Administrator having jurisdiction over the State agency. The Regional Administrator will examine the reasons for rejection, and, if the Regional Administrator agrees, will inform the Regional Administrator with jurisdiction over the order-holding State agency of the rejection and the justifiable reasons. If the Regional Administrator who receives the notification of rejection does not concur with the reasons for rejection, that Regional Administrator will so inform the USES Administrator, who will make a final determination on the acceptance or rejection of the order.

TEMPORARY LABOR CERTIFICATION PROCESS REGULATIONS, 20 C.F.R. PART 655 (1984):*

§ 655.0 SCOPE AND PURPOSE OF PART.

(a) GENERAL. This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not

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*Bracketed sections indicate text of 1978 regulation.

sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3)(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. worker.

SUBPART C-LABOR CERTIFICATION PROCESS FOR TEMPORARY AGRICULTURAL AND LOGGING EMPLOYMENT

§ 655.200 GENERAL DESCRIPTION OF THIS SUBPART AND DEFINITION OF TERMS.

(a) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after

the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working conditions standards, the RA shall deny the temporary labor certification application and offer the employer an administrative judicial review of the denial by a Department of Labor Hearing Officer. If the application is not timely, the RA has discretion, as set forth in these regulations, to either

deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer

may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of approvals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 C.F.R. 214(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers.

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§655.201 TEMPORARY LABOR CERTIFICATION APPLICATIONS.

(a)(1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification

for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

* * * *

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of § 655.202 and § 658.108 of this chapter;

(2) The assurances required by

§ 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later.

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§ 655.202 CONTENTS OF JOB OFFERS.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transportation

costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of [Department of Labor, Occupational Safety and Health Administration] standards set forth at 29 CFR 1910.142 [or the full set of standards of 20 CFR Part 620, if

applicable. See the FEDERAL REGISTER of December 9, 1977, for applicability criteria),] except that for mobile range housing for sheepherders shall meet [guidelines which shall be issued periodically by the Department.] When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers.

(2)(i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at no cost to the worker,

insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

[(4) The employer will provide the worker with three meals a day. The job offer shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA

has approved a higher cost pursuant to §655.211.]*

(5)(i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment,

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* The 1984 version of this section of the regulations reads:

> (4) The employer will provide the worker with three meals a day, except that where under prevailing practice or long-standing arrangement at the establishment workers prepare their meals, employers need furnish only: free and convenient cooking and kitchen facilities. When the employer provides meals, the job offer shall state the cost to the worker for such meals. The cost shall not be more than $4.00 per day unless the RA has approved a higher cost pursuant to § 655.211 of this part;

subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's

worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6)(i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting

of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, 3/4 x (number of days x 8 hours.)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per weekday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will

use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7)(i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount

of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the workers' earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by

representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements;

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all

deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9)(i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii) If the worker will be paid on a piece rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the price rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings

are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate;

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date

specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment of the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for

transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offers shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

§ 655.203 ASSURANCES.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is

granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service

system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the 3/4 guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall

direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organizations, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions

required by § 655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by § 655.205(a).

§ 655.204 DETERMINATIONS BASED ON TEMPORARY LABOR CERTIFICATION APPLICATIONS.

(a) Within two working days after the temporary labor certification application has been filed with it, the local office shall mail the duplicate application directly to the appropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to

recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§ 655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with § 655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that

regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§ 655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

* * * *

§ 655.205 RECRUITMENT PERIOD.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§ 655.201-655.203, the RA shall promptly

notify the employer in writing, with copies to the State agency and local office. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with

respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 30 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.203. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.212 shall

be followed.

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in § 655.212 shall be followed.

§ 655.206 DETERMINATIONS OF U.S. WORKER AVAILABILITY AND ADVERSE EFFECT ON U.S. WORKERS.

(a) If the RA, in accordance with § 655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available.

In making this determination the RA shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under § 655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b)(1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until

November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in § 655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in § 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members

provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing, and by telegram. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

(d)(1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the

foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance of § 655.203(e) is met.

(2) the ES system will continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

CONSTITUTIONAL PROVISIONS

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.